

Backgrounder

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CLINTON IS BYPASSING THE SENATE ON THE ABM TREATY

(Updating *Backgrounder* No. 867, "Removing the ABM Treaty Obstacle to U.S. and Soviet Defenses Against Missiles," November 15, 1991.)

The Clinton Administration has reached a "framework agreement" with Russia to resolve two long-standing disputes over the future and scope of the 1972 Anti-Ballistic Missile (ABM) Treaty.¹ The ABM Treaty all but bars the United States from deploying defenses against long-range ballistic missiles. The agreement with Russia would do two things:

- 1 Name which republics of the now-defunct Soviet Union are subject to the treaty; and
- 2 Define a new dividing line between defenses against long-range missiles, which are subject to the ABM Treaty's restrictions, and defenses against shorter-range missiles, which are not.

The U.S. Constitution requires that the executive branch submit these new agreements to the Senate for its advice and consent. Failing to do so would be illegal.

Yet this is exactly what President Bill Clinton intends to do. The President wants the new agreement with Russia to be implemented as an "agreed statement" in the Standing Consultative Commission (SCC), a joint U.S.-Soviet committee established in 1972 to consult on the details of implementing the ABM Treaty. "Agreed statements" in the SCC do not require the consent of the Senate. In effect, the Clinton Administration is attempting to bypass the Senate, thereby circumventing its constitutional role in the ratification of international treaties. This is not only illegal; it is strategically unwise. The Senate needs to ensure that its constitutional prerogatives are preserved. It needs to take action to force the Clinton Administration to submit the U.S.-Russian agreement to the Senate for its advice and consent.

The Framework Agreement with Russia

While the official text of the framework agreement between the U.S. and Russia has not been made public officially, the press has published a classified version of it.² From public reports, it is clear that the agreement framework attempts to resolve two problems regarding the ABM Treaty. These problems have

- 1 Bill Gertz, "U.S. Accepts Limit on Speed of Anti-Missile Interceptors," *The Washington Times*, December 1, 1995, p. A18; and Bill Gertz, "Deal With Russia Could Hamper Missile Defenses," *The Washington Times*, December 4, 1995, p. A18; and Giacomo, "ABM Agreement With Russia Is Said to Expand U.S. Antimissile Defenses," *The Washington Post*, December 1, 1995, p. A18; and "Text of 'Framework' Altering ABM Treaty," *The Washington Times*, December 4, 1995, p. A8.
- 2 "Text of 'Framework' Altering ABM Treaty," *op. cit.*

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remained ever since the collapse of the U.S.S.R. in December 1991, which effectively nullified America's previous partner in the ABM Treaty—the Soviet Union.

Problem #1: The first is designating which republics of the former Soviet Union would replace the U.S.S.R. as the new legally bound partners of the treaty. Press reports reveal that the Clinton Administration plans to “multilateralize” the treaty by designating several of the 15 former Soviet republics as the new treaty partners.³ These republics would include Belarus, Kazakhstan, Russia, and Ukraine, among others.

Problem #2: The second unresolved problem is to define a new line between defenses against long-range (strategic ballistic) missiles, which are subject to ABM Treaty restrictions, and defenses against shorter-range missiles, which are not. The original language in the text of the ABM Treaty is ambiguous. Article II both fails to define “strategic ballistic missiles” and Article VI fails to explain exactly when non-ABM systems are given an ABM capability or are tested in “an ABM mode.”

The framework agreement would establish entirely new definitions for these systems. Any anti-missile interceptor tested against a target missile with a velocity of 3.1 miles per second or higher and a range of 2,175 miles would be considered a defense against strategic (long-range) ballistic missiles. Therefore, such an interceptor would be subject to the treaty. Second, the agreement would impose a limit on the speed of interceptors. If the interceptor speed is 1.9 miles per second or less, it would not be regarded as a treaty-limited, strategic defense system. An interceptor with a speed in excess of 1.9 miles per second would be presumed to be a strategic defense interceptor and thus subject to the ABM Treaty.

In addition, the framework agreement includes a number of “confidence-building measures.” One would be to impose restrictions on the number and location of defenses against shorter-range missiles deployed by the U.S. The purpose would be to ensure that short-range missile defenses cannot be used as interceptors against the long-range missiles deployed by Russia.

The new definitions and restrictions established in the framework agreement apparently are designed to kill the Navy Upper Tier system, a missile defense system the Navy is developing for use on cruisers. The Navy Upper Tier's interceptor, called the *Standard* missile, has a velocity of greater than 1.9 miles per second; therefore, it would be subject to ABM Treaty restrictions under the framework agreement. Since Article V of the ABM Treaty prohibits the development, testing, and deployment of interceptors on mobile platforms such as ships, the velocity for the *Standard* missile would have to be reduced to comply with the Treaty. This would weaken the capability of the missile, effectively making it less useful as a defense against ballistic missiles.

Moreover, the confidence-building measures contained in the agreement would give the Russians and other countries a veto over where and in what numbers the Upper Tier ships may be deployed. The reason: The agreement requires the U.S. to provide assurances to its ABM Treaty partners that deployed defenses against short-range missiles will not pose a realistic threat to long-range missiles. But this means that Russia and other countries, not the U.S., will judge whether these deployments are a threat. If they feel threatened by U.S. defenses, they simply will veto America's deployment of the Upper Tier ships.

3 Gertz, “U.S. Accepts Limit on Speed of Anti-Missile Interceptors.”

Clinton Bypasses the Senate

Anticipating that the Clinton Administration was likely to bypass the Senate with a new resolution on the ABM Treaty, Congress last year sought to ensure that an agreement with Russia and perhaps several other republics of the former Soviet Union would be subject to review by the Senate. Section 232 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337) states: "The United States shall not be bound by any international agreement entered into by the President that would substantively modify the ABM Treaty unless the agreement is entered pursuant to the treaty making power of the President under the Constitution."

In the past, the Clinton Administration has argued that it could not pledge in advance to submit ABM Treaty agreements to the Senate because it could not know whether their content would warrant Senate review. Of course, the content of the agreement is now known, but the Clinton Administration still refuses to submit the agreement to the Senate. Instead, it rushed to a meeting of the Standing Consultative Commission, on December 4, in order to formalize the agreement with the Russians. All outward appearances indicate that the Administration intends to treat the agreement as an SCC "agreed statement" not subject to Senate review.

In short, the Clinton Administration apparently plans to present the Senate with a *fait accompli*. The President's advisors may try to argue that the Russian agreement does not substantively modify the ABM Treaty. But this would make a mockery of the law and the facts. The very first clause of the ABM Treaty begins by saying that "The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties" will be subject to the treaty. Surely, striking the reference to the Soviet Union and replacing it with the names of as many as 12 countries substantively modifies the ABM Treaty.

Changing the names of the parties amounts to more than a formality. It could result in a fundamental change in the deployment restrictions of the treaty. A 1974 protocol to the treaty limits each side to one ABM site of 100 interceptors.⁴ If 12 states are designated to replace the Soviet Union, each as a legal party to the treaty, then the ABM Treaty now would allow 12 ABM sites on the territory where it previously allowed only one. Surely, adding 11 new ABM sites is a substantive change in the treaty.

Further, the SCC was designed to work as an implementation forum between two parties. Substantive arrangements for the functioning of the SCC must change if more than two states are participating. Under the new arrangement, the U.S. would face as many as 12 representatives on the other side of the table instead of one. One of those representatives is certain to be Russia. Most of the other countries in the SCC would likely be under the influence of Russia and might even form a voting bloc with Russia, thereby easily outvoting the U.S. in settling disputes. It would be absurd to argue that changing the SCC in this way is not substantive.

What the Senate Should Do

The impending actions by the Clinton Administration present the Senate with a challenge to its treaty-making authority. The Senate has political and legal tools at its disposal to confront the Clinton Administration's attempts to bypass it.

The political tool is to withhold Senate action on matters deemed important by the President until the agreement is submitted to the Senate. The logical targets of delay by the Senate would be other treaties, including the Chemical Weapons Convention, the Strategic Arms Reduction Treaty II (START II), and, if the dispute carries on beyond next year, the Comprehensive Nuclear Test Ban Treaty as well.⁵ The Senate lead-

⁴ The 1974 protocol is an example of how to amend the ABM Treaty in a proper fashion. The protocol was submitted for Senate consent, which the Senate granted on November 10, 1975.

ership should make it clear that it will not complete action on any of these treaties if the Administration tries to circumvent the Senate with its changes in the ABM Treaty.⁶

The legal tool is for the Senate to pass a resolution calling on President Clinton to submit the framework agreement for the advice and consent of the Senate. Assuming Clinton refused, the Senate could instruct its Office of Legal Counsel to file suit against the Clinton Administration with the intent of barring implementation of an ABM Treaty agreement that does not have Senate approval. While the statute governing the operation of the Senate's Office of Legal Counsel does not expressly authorize initiating lawsuits on behalf of the Senate as an institution, it would be possible for the Senate leadership to authorize this action by adopting a Senate resolution. Further, an individual member of the Senate could file a similar suit on his or her own. It would be preferable, however, for the Office of Legal Counsel to file the suit and speak for the Senate as an institution.

Conclusion

The framework agreement which the Clinton Administration has reached with Russia, assuming it is formalized in the coming days, will have a profound impact on the nation's security. It will determine which countries become ABM Treaty partners, change the way the ABM Treaty functions, and impose new restrictions on U.S. programs for fielding defenses against both shorter-range and long-range missiles. The voice of the Senate deserves to be heard on such important matters.

However, hearing the Senate's voice appears to be too inconvenient for the President. He is trying to bypass the Senate by changing the ABM Treaty on his own, without submitting his changes to the Senate for its advice and consent. This is patently illegal. The treaty-making powers vested in the Senate by the Constitution exist to protect the nation's security, not to suit the convenience of the Clinton Administration. The Senate should be prepared to fight to uphold both its responsibilities and the nation's security. The Administration's framework agreement on the ABM Treaty should be brought before the Senate for its advice and consent.

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5 The Clinton Administration plans to conclude a Comprehensive Nuclear Test Ban Treaty, which is now in negotiation, sometime next year.

6 The Senate leadership entered two unanimous consent agreements on December 7 to take up START II before the end of the current session of Congress and the Chemical Weapons Convention by the end of April 1996. Neither agreement requires the Senate to complete action on either START II or the Chemical Weapons Convention by a date certain.

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